ADOPTION AND THE EUROPEAN COURT OF HUMAN RIGHTS:
FROM LAISSEZ-FAIRE TO JUDICIAL LAW-MAKING

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1. The absence of a right to adopt under the European Convention on Human Rights

One of the most distinctive features of the jurisprudence of the Strasbourg organs is the dynamic interpretation of the provisions of the European Convention on Human Rights (ECHR), resulting in a gradual expansion of the scope of application thereof. In an attempt to reduce the discrepancy between social and legal realities, the European Court took the view that "this Convention must be interpreted in the light of present-day conditions. This interpretative flexibility stems from the need to apply the imprecise provisions of an abstract legal text to a concrete set of facts." It also reflects the spirit of the ECHR, which, as expressed in its Preamble, aims at ensuring not only the "safeguard" but also the "development" of human rights; by taking into account the evolution of customs and adapting the significance of the text accordingly, the ECHR monitoring bodies have attempted to guarantee the consistency of the instrument with the changing standards of society.

Nonetheless, much as it may be sympathetic with the situation of an applicant, the European Court is not called upon to overstretch the conventional text in order to ac-

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** Tyrer v United Kingdom, Application no. 58561/72, European Court of Human Rights [hereinafter Ehr Court H.R.] judgment of 25 April 1978, para. 31; Madder v Belgium, Application no. 68327/74, judgment of 13 June 1979, para. 41.

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2 See M. LEVRENI, Filiation et vie familiale, in E. BUTEE (ed.), Le droit au respect de la vie familiale au sens de la Convention européenne des droits de l'homme, Bruxelles, 2002, p. 113; elle est, comme tout texte juridique, "affecté(e) d'un certain degré d'indétermination" et nécessite la construction de la signification de l'incertitude propre à tout "agar juridictionnel", autrement dit "une interprétation avant acte d'application".

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commodate any social or legal novelty intervened after the adoption of the Convention. In fact, it is not the Court’s prerogative to establish new rights by way of judicial amendment of the Convention. Any new rights that the Contracting Parties are to consider worthy of international guarantee should form the object of inter-governmental negotiation aimed at introducing further additional protocols.

The evolutionary approach to the interpretation of ECHR, seen as a ‘living instrument’, can be particularly discerned with regards to the notion of ‘family life’, the Court having continuously redefined sexuality, social parenthood and family-like co-habitation. Nonetheless, faced with repeated applications revolving around the right to adopt, and despite the widespread enactment of adoption legislation in Europe, the Strasbourg judge refused to overstep its interpretative role, indicating that it is not willing to read a new right into the Convention.

In an early decision in the case of X v Belgium and Netherlands, the European Commission stressed that there is no express provision guaranteeing a right to adopt either in the European Convention itself or in the International Covenant on Civil and Political Rights. Consequently, there is no obligation for the State under Article 12 to recognize to a foster carer a particular status in relation to the child they had in their care. Since the case involved a sole applicant, and any rights under Article 12 concern heterosexual couples, the Commission did not discuss the more general issue of whether there is a positive obligation for States to guarantee the alternative of adoption to married couples unable to procreate and found a family.

The issue was subsequently addressed in the X and Y v United Kingdom decision, where the Commission rejected the contention that the State’s positive obligations under Article 12 encompassed an obligation to guarantee the right to adopt. According to the Commission, the right to adopt, found within the meaning of Article 12 protects a couple’s right to naturally procreate, but does not guarantee the right to integrate into the family, through adoption or otherwise, a child who is not the biological child of the couple. Furthermore, since the institution of adoption does not respond to an ECHR right, it is left to national law to determine whether, or subject to what conditions, the exercise of the right in such a way should be permitted.

Consequently, both the right to adopt and the conditions for its exercise appeared to fall outside the scope of the ECHR and the supervision of the Strasbourg organs.

2. Eligibility to adopt, civil status and sexual orientation

The UN General Assembly Resolution 41/85 of 3 December 1988 proclaiming the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally reveals a world-wide consensus on the social function of adoption. Article 13 of the Declaration clearly indicates that adoption does not serve the purpose of ena-
bling infertile couples to have children; rather, «[the primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family]. Consequently, as expressed in Article 5, «[i]n all matters relating to the placement of a child outside the care of the child’s own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration». These concerns can justify domestic policies limiting the eligibility to adopt to certain categories of applicants considered capable of offering a stable home, and the conditions for the harmonious development of the child (e.g., married couples). Regardless of the specific national provisions on eligibility, the generation of parental status through adoption presupposes, in all domestic legal systems, a stamp of approval from the competent authorities. 12

Under the ECHR, absent a right to adopt, States should arguably enjoy a wide margin of appreciation in defining their legislative policies on adoption, in particular by restricting the eligibility of adopters and adoptees according to their own assessment of what better serves the interests of the child in the given social context. This was also the initial stance of the Strasbourg organs, though the restrictions in respect of single persons, unmarried couples and homosexuals have proved to be increasingly contentious.

In the above-mentioned case of X v Belgium and Netherlands, the Commission clarified that Article 12 does not protect the right to have children outside marriage, insofar as this provision guarantees one single right, «to marry and to found a family», rather than two separate rights. 13 The Commission seems to admit that a man and a woman of marriageable age, albeit never married, may have a right to found a family, whereas in the absence of a couple there is no similar individual right. However, even assuming that the right to found a family may be considered irrespective of marriage, the problem is not solved. Article 12 recognises in fact the right of man and woman at the age of consent to found a family i.e. to have children. The existence of a couple is fundamental. The Commission apparently avoids taking a stand on the matter: the ambiguous wording «even assuming» may indicate a mere hypothetical concession reinforcing the argumentation. What is clear is that the guarantee in Article 12 only benefits the couple, more specifically the heterosexual couple, therefore the eligibility of the single person to adopt cannot find support in this provision.

The applicant in X v Belgium and Netherlands, a Dutch national living in Belgium, was denied the possibility to adopt an abandoned child for whom he had cared for several years, merely on the ground that he was unmarried. 15 The Commission hastily dismissed the application of Article 8 relying on the absence of a right to adopt, as discussed above. It failed to distinguish between an application for a generic authorization to adopt and an adoption application in respect of a minor already cared for by the applicant. Surprisingly, the Commission did not attempt to establish whether the lengthy family-like relationship between the foster parent and the child amounted to “family life” within the meaning of Article 8. Nor did it make any inquiry into the child’s welfare, for example by discussing whether a court order formalizing the relationship could have better provided the child with a secure home environment, patrimonial rights or psychological comfort.

A further challenge to the denial of a right to adopt for single persons (this time regarding the general authorization to adopt) was considered in the Di Lazzaro v Italy 1996 decision. The Commission declared the application inadmissible by reiterating and synthesizing the motivations put forward in the earlier case law: «The Commission recalls that the right to adopt is not, as such, included among the rights guaranteed by the Convention and that Article 8 does not oblige States to grant to a person the status of adoptive parent or adopted child. Article 12 of the Convention, which recognises the right of man and woman at the age of consent to found a family, implies the existence of a couple and cannot be construed as including the right of an unmarried person to adopt.»

Applications by single persons may have some prospects of success where brought against a State party to Protocol 12, which extends the principle of non-discrimination in Article 14 to the enjoyment of any right guaranteed by the domestic legal order, regardless of its presence in the ECHR. 16 The Strasbourg Court is likely to analyse the restriction of the right to adopt in the case of unmarried persons as different treatment motivated by the civil status. The burden of proof would then lie on the State to show why the difference was justified, and that the measure was proportionate to the aim pursued.

The cause of homosexual aspiring adopters has recently obtained the assent of the Strasbourg Court, though it came after a long and strenuous battle for the recognition of homosexuals’ rights under the ECHR. Initially, the rights of homosexuals under the Convention were only upheld in relation to their private life, with the Strasbourg organs prompting for the decriminalization of sexual activity privately engaged in by

12 The Belgian civil code authorized adoption by foreign residents, provided that they satisfied the conditions imposed by their national law: according to the Dutch civil code, the unmarried person could not adopt.
14 Article 1 of Protocol 12 reads: «The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a cational minority, property, birth or other status».
15 The Protocol was adopted on 4 November 2000 and entered into force on 1 April 2005. To date it has been ratified by only 18 of the 47 Member States of the Council of Europe [Last updated 11 February 2010].
The choice of treating same-sex partnerships as a manifestation of private, but not family life, was criticized by the legal scholarship as inconsistent with the jurisprudence in other areas. It was argued that marriage does not constitute a pre-condition of family life, according to the very jurisprudence of the Strasbourg organ. This position also appears at odds with the principle identifying family life wherever there are effective ties between those concerned. Moreover, the Court has acknowledged that family life exists even where one member is a transponder person whose newly acquired sex is not legally recognized (which legally amounts to a same-sex relationship), specifically in the light of the effective bonds and family-like caring, support, and sharing of daily-life responsibilities.

However, the case law on homosexual cohabitation evidenced how the lack of recognition of same-sex cohabitants as families adversely affects their patrimonial interests. In Rössli v Germany the Court held that the surviving same-sex partner cannot base a right to succeed to the lease on Article 8, subsequent judgments took a more favourable view, allowing stable same-sex cohabitors to better cope with practical difficulties. In the 2003 Karner v Austria judgment, the European Court accepted that the impossibility for the applicant to take over the lease of the deceased same-sex cohabitant affected the right to protection of the home under Article 8; however, it still did not qualify homosexual cohabitation as family life. The Court recalled that the different treatment of homosexual couples may be justified by the legitimate objective of preserving the traditional family unit, but also stressed that differential based exclusively on sexual orientation require a particularly strong justification. It indicated that, in a field like discrimination where the margin of appreciation of national authorities is narrow, the respect of proportionality between the aim pursued and the means employed required a demonstration that it was necessary, in order
to reach the aim, to exclude homosexual couples from the application of the relevant legislation. Finding that the measure had not been proved necessary, the Court concluded that the measure breached Article 8 taken in conjunction with Article 14.21

In Salgueiro Da Silva Moreira v Portugal, the Strasbourg Court has for the first time approached sexual orientation from the viewpoint of family life, though not in respect of a same-sex partnership, but as regards discrimination against the homosexual parent in custody proceedings.22 The Court found a violation of Article 14 taken in conjunction with Article 8 in the decision of the Lisbon Appeal Court to reverse a residence order in favour of the father merely on the ground that he was in a same-sex relationship with another man.23 Recalling its earlier jurisprudence regarding child custody, in which a parent had been discriminated against on account of his religious convictions,24 the Court found that the Portuguese court’s decision amounted to discrimination based on sexual orientation. The judgment was in line with Recommendation 924 (1981) of the Parliamentary Assembly of the Council of Europe on discrimination against homosexuals, which specifically addresses custody of children and visitation rights.25 However, the judgment did not contribute to advancing the family rights of same-sex cohabitants, as no new right was upheld. Since the mutual enjoyment of parent and child constitutes an essential element of family life,26 the bond between them is indisputable, and State authorities are obliged to allow them to lead a normal family life,27 even when one parent has subsequently manifested his or her homosexual orientation.28

That said, the presence of children does not automatically place a same-sex rela-

20 Ibid., para. 41.
21 Ibid., para. 42-43.
22 Salgueiro da Silva Moreira v Portugal, Application no. 32390/98, Eur Court H.R. judgment of 21 December 1999. The applicant had been repeatedly denied access to his daughter by his ex-wife, in breach of his custody rights as agreed upon divorce. He had consequently sought, and obtained in first instance, custody of the child, but the decision had been reversed on appeal based on the child’s welfare and on the sexual orientation of the father, who lived with another man. The appeal court’s decision stigmatized the father’s sexual orientation and focused on it to a considerable extent.
23 Ibid., paras. 34-35.
24 In Hoffmann v Austria, the Court had established that the mother’s affiliation with Jehovah’s witnesses could not be held against her in proceedings aimed at determining the son’s custody, as a distinction merely based on religious beliefs was not acceptable. See Hoffmann v Austria, Application no. 12875/87, Eur Court H.R. judgment of 23 June 1993, para. 58.
25 See Recommendation 924 (1981) of the Parliamentary Assembly of the Council of Europe on discrimination against homosexuals, point 7: “RECOMMENDS that the Committee of Ministers […] ill call on the governments of the member states: [...] d) to ensure that custody, visiting rights and accommodation of children by their parents should not be restricted on the sole grounds of the homosexsual tendencies of one of them.”
27 Idem, par. 31.
28 See C. LEBERT, Filiation et vie familiale, cit., p. 142: «[Il] y a un nouveau problème pour reconnaître l’existence de liens familiaux et la nécessité de les sauvegarder.»

29 C and LM v United Kingdom, Application No. 14753/89, Eur Comm H.R. decision of 9 October 1989. The Commission found that sibship partnership involves private lives, and accepted that the separation of the biological mother, an Australian national, and the baby «will have repercussions on their private life, but maintained that «lawful separtation […] cannot, in principle, be regarded as an interference with this Convention provision, given the State’s right to impose immigration controls and limits.”
30 Kerkhoven and Hinke v Netherlands, Application no. 15666/89, Eur Comm H.R. decision of 15 May 1992. The Commission further considered that «the statutory impossibility for the first applicant to be vested with the parental authority over the third applicant does not entail any restriction in the applicant’s enjoyment of their private life», therefore «there has been no interference with the applicant’s right to respect for their private life».
31 Frei v France, Application no. 36515/97, Eur Court H.R. decision of 12 June 2001, para. 1: «La Cour rappelle que l’article 12 de la Convention se borne à garantir le droit de se marier à l’égard des deux personnes de sexes biologiques différents et ni cet article ni l’article 14 ne garantissent le droit à l’adoption.»
32 Frei v France, Application no. 36515/97, Eur Court H.R. judgment of 26 February 2002, para. 32. The Court also considers that the dismissal of the authorization to adopt did not infringe the right to respect for private life. «The decision to dismiss the applicant’s application for authorization could not be considered to infringe his right to the free expression and development of his personality or the manner in which he led his life, in particular his sexual life.»
gie persons – whether men or women – to apply for adoption [...] and the applicant maintained that the French authorities’ decision to reject his application had implicitly been based on his sexual orientation alone. If this is true, the inescapable conclusion is that there was a difference in treatment based on the applicant’s sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention.43

The analysis was rather confined to Article 14 taken independently,44 even though this provision has no autonomous application where the matter complained of falls outside the scope of any of the ECHR substantive rights.45 The Court considered that the decision of the French authorities that the applicant was unsuitable to adopt had followed an examination by the competent body and pursued the legitimate aim of safeguarding the health and rights of the minor potentially adopted.46 The reports drafted by the social workers, in which Mr Fretet’s aptitude to raise a child was assessed, mentioned the lack of a maternal referent in his family. The European Court supported the thesis of the respondent government, according to which what was at stake was not only the interest of the adult to adopt, but also the interests of the child potentially integrated into a new family environment. Faced with competing interests, the Court insisted on the primacy of the rights of the child, emphasizing that adoption means “providing a child with a family, not a family with a child”.47

Once established that the measure pursued a legitimate aim, the Court examined whether the balance implicitly requested by Article 14 between the aim and the means employed had been observed. In that connection the Court noted the lack of consensus among the Contracting Parties as to the suitability of homosexuals to adopt, and thus concluded that a wide margin of appreciation needs to be recognized in favour of domestic authorities.48 This circumspection is perhaps surprising after the Court went the extra mile to demonstrate that Article 8 was applicable.49 Even though it acknowledged that the ECHR is a living instrument, it affirmed that the State is better placed to decide under which circumstances adoption can offer the minor a stable and harmonious development.50 The Court thus refused to take a stand on the issue of homosexuals’ suitability to adopt. Though commentators might see it as a convenient manoeuvre,51 the choice was probably appropriate, considering the lack of decisive scientific evidence in either direction, and the lack of a homogeneous legislative approach throughout the Council of Europe States.

The question has, however, returned to the attention of the Strasbourg court with the E.B. v France case,52 and the 2006 ruling effectively superseded Fretet v France. In a markedly split decision, the Grand Chamber held by ten votes to seven that there had been a violation of Article 14 in conjunction with Article 8 in respect of the authorities’ refusal to allow the lesbian applicant to adopt a child. As far as the admissibility of the case was concerned, the Court found that the facts of the case (in particular the French legislation expressly granting single persons the right to apply for authorization to adopt) fell within the ambit of Article 8: in creating a right to adopt, the French State had gone beyond its obligations in Article 8, but once the right was created national authorities were not permitted to take discriminatory measures in applying it.53

The issue before the court was, therefore, whether the decisive consideration given to the whirnosexuality of E.B. in assessing her adoption application amounted to discrimination. In this respect, the Court found that the rejection was motivated by two main grounds: the lack of commitment of E.B.’s ‘same-sex’ cohabitant, and the absence of a father figure in the household. The Court noted that there had been no discrimination with regard to the first ground for rejection (the partner’s attitude towards adoption).

43 Ibid.
44 In practice, the case is treated as an application under Protocol 12 ECHR, establishing a general prohibition of discrimination, with independence from the violation of a right enshrined in the Convention. France had not ratified Protocol 12, therefore, it could not be relied on. However, in relation to the States Parties to the Protocol, where national legislation recognizes the right to adopt to unmarried persons, the refusal based on sexual orientation can be analysed as different treatment in respect of a right set forth by domestic legislation (though not an ECHR right). It could be maintained that, once the national legislation establishes a right to adopt, any difference in treatment based on sexual orientation must have a legitimate justification. However, the “moral” or “rights of others” (i.e. of adoptable children) are veiled concepts, and the difference of treatment may not necessarily be categorized as discrimination given the wide scientific and sociological controversy on the matter.
45 See P. MURAT, Diffusion, cit., p. 200: “Fidèle à la technique utilisée pour les problèmes complexes et polémiques, la CEDH se refuse derrière l’absence de dénominateur commun aux systèmes juridiques des États contractants [...] pour conclure qu’il est souhaitable de laisser une large marge d’appréciation aux autorités de chaque État. La solution est sans doute sage, même si certains ne manqueront pas de trouver paradoxal qu’après avoir retenu de manière quelque peu hâtive l’irrégularité de la Convention, la Cour parvienne faire preuve de frilosité et donne l’impression de s’arrêter au milieu du gou [...].”
46 Ibid. p. 38: “‘Il est évident que le jugement de la Cour est en faveur de la légalité et de la régularité du procédé de placement d’un enfant où la partie requérante n’avait pas respecté au préalable le règlement intérieur de l’institution qui avait la charge de l’enfant.”
47 See Fretet v France, judgment cit., para. 38: “In the Court’s opinion there is no doubt that the decision of the applicant’s application for authorization pursued a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure, for which the granting of authorization was, in principle, a prerequisite.”
48 Ibid., para. 41.
49 See ibid.: «Since the delicate issues raised in the case, therefore, touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State.»
50 See P. MURAT, Diffusion, cit., p. 200: “Fidèle à la technique utilisée pour les problèmes complexes et polémiques, la CEDH se refuse derrière l’absence de dénominateur commun aux systèmes juridiques des États contractants [...] pour conclure qu’il est souhaitable de laisser une large marge d’appréciation aux autorités de chaque État. La solution est sans doute sage, même si certains ne manqueront pas de trouver paradoxal qu’après avoir retenu de manière quelque peu hâtive l’irrégularité de la Convention, la Cour parvienne faire preuve de frilosité et donne l’impression de s’arrêter au milieu du gou [...].”
51 See Fretet v France, judgment cit., para. 42: “Il est évident que le jugement de la Cour est en faveur de la légalité et de la régularité du procédé de placement d’un enfant où la partie requérante n’avait pas respecté au préalable le règlement intérieur de l’institution qui avait la charge de l’enfant.”
53 Ibid., para. 48-49.
tion); where an unmarried applicant had set up home with a partner (same-sex or not), the best interests of the child joining the home required consideration of the partner’s attitude, in the light of the role that the latter would necessarily play in the life of the child on a daily basis.34

As to the objection relating to the absence of a father figure, the Court did not find it problematic in itself, but the excessive references in a case concerning adoption by a single person was considered to be implicitly connected with the applicant’s homosexuality.35 Consequently, the applicant had suffered a difference in treatment which the Court found discriminatory insofar as based on sexual orientation. The Court also noted that the two main grounds for rejection formed part of an overall assessment of the applicant’s suitability to adopt, therefore the illegitimacy of one of the grounds had the effect of contaminating the entire decision.36

If in Frentti the Court was to some extent excessively prudent, in E.B. it arguably was over simplistic. The majority of the Court considered that, since national law allowed unmarried persons to adopt, the absence of a paternal referent in the household of a lesbian adopter was not a sufficient reason to deny adoption. The Court seems to miss the actual core of the debate surrounding adoption by homosexuals, which lies in distinguishing between the absence of either the maternal or the paternal figure (which is not out of the ordinary, given the frequency of single-parent families), and the presence of two maternal/paternal figures. A genuine analysis of the problem should have aimed at determining whether, for the child, being integrated into a same-sex family raised welfare issues or not, in the light of the psychological and social impact of such adoption. Since the case was one about competing interests, insufficient attention was arguably paid to the traditional balancing exercise. The Court simply assumed that a difference of treatment based on sexual orientation, if proved, would amount to discrimination, implicitly dismissing the possibility for an objective justification based on the health or the rights of the child: “In the Court’s opinion, if the reasons advanced for such a difference in treatment were based solely on considerations regarding the applicant’s sexual orientation this would amount to discrimination under the Convention.”37

However, this demonstration had not yet been made in E.B., and previously in Frentti the inquiry had ended in a non liquet. Ultimately the priority given to the prohibition of discrimination seems to oust the fair balance principle, the paramountcy of the child’s welfare, and the principle that not every difference in treatment amounts to discrimination.

Moreover, the suggestion that the wrongful reliance on the lack of a paternal referent invalidated the entire assessment process underestimates the relevance of the lack of commitment of the lesbian partner – the other argument disqualifying E.B.’s adop-

34 Ibid, paras. 75-77.
36 Ibid, para. 90.
37 Ibid, para. 95.
is international consensus that adoption should only be seen as a solution where the birth family is unable or unwilling to care for the child. Absent such extraordinary circumstances, the natural bond between parents and children is widely recognized and protected, as evidenced by the already recalled UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally. Article 3 of the Declaration acknowledges that the child’s welfare is best promoted if the child is raised by his or her birth family. According to Article 4 of the Declaration, adoption should be considered where the development of the child within the birth family is impracticable (because the parents are deceased, unknown, or unwilling to care for them) or exposed to harm (where the parents neglect or subject the child to ill-treatment).

The case law of the Strasbourg organs reflects the general international outlook on adoption as a means of last resort, where the biological parents are unable or unwilling to assume parental responsibility. Thus, in Johansen v Norway, the Court stressed that the taking over care of the applicant’s daughter on a permanent basis with a view to adoption and the deprivation of her parental rights and access to the child constituted an interference with the child’s and the mother’s right to mutual enjoyment under Article 8. The Court was satisfied that the impugned measures were in accordance with domestic law and pursued legitimate aims, as they aimed at protecting the “health and ‘rights and freedoms’ of the applicant’s daughter,” however, in respect of the deprivation of the applicant’s parental rights and access, the Court found that it had a permanent character, and could only be considered ‘necessary’ within the meaning of Article 8 para. 2 (art. 8-2) if supported by particularly strong reasons,” whereas “the applicant’s state of health had not been such that she would have been permanently unable to care for her daughter. The strictness of the Court’s supervision in Johansen appears commensurate to the extreme nature of the interference. The permanent termination of parental status and of all contact against the wishes of the natural parent is arguably the most severe form of interference with a parent’s rights under Article 8; it can only be justified where it is obvious that the child cannot be reunited with the parents in the foreseeable future, and that there are no less intrusive means to secure the well-being of the child.

The ramifications of the constraints placed on States by parents’ rights in adoption cases were recently evidenced in X v Croatia. In this case, the mother, who suffered from paranoid schizophrenia, was divested of the capacity to act, on the ground that her illness affected her capacity to take care of her own rights and interests. The consequence in domestic law was that she was also divested of parental rights, her consent for adoption not being required. The applicant’s daughter had lived with the mother for the first two years of her life, though she was effectively cared for by the maternal grandmother; she was subsequently taken into foster care, but maintained contact with the mother. The exclusion of the applicant from the proceedings leading to the adoption order was based on the automatic effect of her being divested of the capacity to act, and she had been given no opportunity to express her views about the potential adoption. Under the circumstances, the Court considered that a bond had been formed between mother and child amounting to family life within the meaning of Article 8 ECHR. The adoption order, severing all ties between the applicant and her child, amounted to a very serious interference with her family life, and this interference was incompatible with the Convention insofar as the authorities had never assessed the relationship between the applicant and her child prior to the adoption proceedings, nor had there been a separate decision on the applicant’s parental rights.

Violations of Article 8 have equally been found where the natural father’s rights in adoption proceedings were not properly observed. The Court accepted, as a matter of principle, that a different treatment between mothers and unmarried fathers is lawful under the Convention in the light of the variable relationship between a child and a natural father, going from commitment to indiscernibility. However, the obligation to allow a natural parent to be sufficiently involved in adoption proceedings generally extends to unmarried fathers, as shown by Keegan v Ireland. The case concerned the adoption of a child without the knowledge or consent of the natural father. Following the breakdown of their relationship, the mother had decided to offer the child for adoption immediately after the birth, and was able to do so as domestic legislation did not recognize any right to the biological father, unless he had been designated as the child’s legal guardian. The European Court relied on the principle established in the Marckx judgment, according to which a child forms a family unit with the parent since the moment of birth and by the very fact of it, regardless of the nature of the legal ties

60 Article 3 reads: “The first priority for a child is to be cared for by his or her own parents. Similarly, the third paragraph of the Preamble to the Declaration reaffirms the need to protect the integrity of the biological family, a principle enshrined in the 1959 UN Declaration on the rights of the child: ‘…affirming principle 6 of the Declaration [of the Rights of the Child], which states that the child shall, whenever possible, grow up in the care and under the responsibility of his parents and, in any case, in an atmosphere of affection and of moral and material security.’”

61 Article 4 reads: “When care by the child’s own parents is unavailable or inappropriate, care by relatives of the child’s parents, by another substitute – foster or adoptive – family or, if necessary, by an appropriate substitute should be considered.”


63 Ibid., para. 56.

64 Ibid., para. 74. The Court added that “[t]he argument that the applicant might disturb the calm and stable foster-home environment could not be decisive as access arrangements could be implemented outside the foster home. Having regard to the improvements in the applicant’s situation and the irreversible effects which the deprivation of the applicant’s parental rights and access had on her enjoyment of family life with her daughter, the measures could not be said to be justified.”


66 Ibid., para. 55.

67 See M v United Kingdom, Application no. 22920/93, ECHR Court H.R. decision of 6 April 1994, para. 3. ‘The relationship between a natural father and a child may differ widely in nature and degree from, for example, circumstances where a child is conceived casually, unintentionally or perhaps even violently to the situation where a child is born into a stable and established relationship between an unmarried man and woman.”
between them. Several factors supported the finding on the facts of the case: the couple had cohabited for a significant period of time, they had knowingly decided to conceive a child during the preparation of their wedding, and the father had constantly manifested interest in the child during the pregnancy and after the birth.

The stable relationship between the natural father and the mother, as well as the former's commitment towards the child, lead to a presumption of "family life" that cannot be interfered with without consulting the natural father, even where the relationship between the parents has broken down before the child's birth. Nonetheless, it is unclear whether the same obligations exist in sub-vos-vos natural fathers where the child is the result of a fleeting relationship. Arguably, the Court in Keegan would not have had to rely on additional arguments to prove pre-existing family life and the father's commitment if the mere biological relationship had resulted in the same right to be consulted in relation to the adoption.

The recent case law has also limited States' autonomy in regulating adoption as far as the legal effects of an adoption order are concerned. As is known, adoption normally severs all legal ties with the birth family and creates a new legal relationship with the adoptive family. This may result in undesired consequences in the case of in-family adoptions whereby a step-parent wishes to form a legal bond with the step-child, but his or her spouse, the natural parent, also wishes to preserve theirs. In Emonts v Switzerland, national provisions whereby the adoption of a disabled adult by the mother's cohabitee had the effect of severing the legal ties with the mother was considered to constitute a violation of Article 8. The Court found that "respect" for the applicants' family life required that biological and social reality be taken into account to avoid the blind application of the provisions of the law to this very particular situation for which they were clearly not intended. Failure to take such considerations into account flew in the face of the wishes of the persons concerned, without actually benefiting anybody. Unlike other rulings concerned with the application of domestic adoption law by different State authorities in a particular case, this judgment directly called for legislative reform in the area of adoption, showing the far-reaching effects of Strasbourg supervision.

However, the rights of natural parents in connection with adoption are not unlimited, because they need to be balanced against the rights of the children. Moreover, the Strasbourg Court suggested in the 2008 Keams v France judgment that, in a case in which the competing interests of the biological mother, the child and the adoptive family are at stake, "[i]n striking a balance between these different interests, the child's best interests should be paramount. In particular, the judgment established that a time limit of two months prescribed by national law for a parent to withdraw consent to adoption did not infringe the parent's right to respect for family life. The rationale lay in the interest of the child to create new bonds with the adoptive family as soon as practically possible.

4. Dispensing with parental consent to further the best interests of the child

Under exceptional circumstances, where the child's bonds with the biological father are significantly weaker than the bonds established with the step-parent, the Court does not consider the adoption order in favour of the latter a violation of the former's Article 8 rights. According to the Court's reasoning in Söderböck v Sweden, the natural family ties must give priority to the de facto family ties formed between the step-parent, the mother and the child in the course of several years. Similarly, in Kipper v Netherlands - which, interestingly, concerned an adoption severing the legal ties with the mother - the Court had regard to the fact that the request for adoption merely sought to consolidate existing ties, and that it was fully supported by the child, who had almost come of age.

The more recent case of Eki v Austria confirms that domestic courts' decision to grant permission for a child to be adopted without the consent of the natural parent does not necessarily breach Article 8 if the decision serves the best interests of the child concerned and reflects an already existing social reality. The child's parents had separated when she was two years old, and there had been very little contact between the child and the natural father, who had not made maintenance payments, and during the

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1 See Keegan v Ireland, Application no. 16368/89, Eur Court H.R. judgment of 25 May 1994, paras. 44.
2 Emonts v Switzerland, Application no. 38972/03, Eur Court H.R. judgment of 13 December 2007, para. 86.
3 See Keams v France, Application no. 35991/04, Eur Court H.R. judgment of 10 January 2008, paras. 79.
4 For discussion of similar cases, see Kipper v Netherlands, Application no. 64486/03, Eur Court H.R. decision of 3 March 2005.
5 Kipper v Netherlands, Application no. 64486/03, Eur Court H.R. decision of 3 March 2005.
visits his aggressiveness towards the mother caused the child to suffer stress and anxiety. The Strasbourg Court considered that the adoption decision had constituted an interference with Mr Eski's right to family life, but that the domestic courts had struck a fair balance between the competing interests involved. In particular, the following elements indicated that the decision had not been disproportionate: the absence of close ties between father and child, the father's lack of commitment demonstrated by the unwillingness to provide financial support, the detrimental effect on the child of the father's attitude towards the mother, and the child's views to the effect that she considered the mother's husband as her father and favoured the adoption, which thus merely consolidated de facto ties.75

However, it should be stressed that the reprehensible conduct of the natural parent, as seen in Eski, is not the decisive argument. The judgment in Chepelyeva v Russia disclosed a similar concern for allowing the consolidation of the new social family created between child and step-father when the natural parent's presence in the life of the child is simply marginal. In Chepelyeva, the new husband of the applicant's ex-wife had successfully brought proceedings to adopt the applicant's daughter, as the domestic courts considered the adoption to be in the best interests of the child. The Strasbourg Court supported the domestic courts' assessment, insofar as the applicant had not seen his daughter since she was two years old (more than three years before the adoption order was granted) and she considered the mother's husband to be her father.76

This consistent pattern of jurisprudence shows that, under the balance of interests doctrine, natural parents who fail to prove commitment (infrequent contact, no financial support, etc.) seem to forfeit their right to parental status, for the benefit of the child's legal integration into an already existing de facto family.

5. The (almost) equal standing of biological and adoptive families under Article 8

Starting from the early case law of the Strasbourg organs, it became apparent that adoptive parents and children are entitled to the same protection under Article 8 as any other form of family. In the 1975 X v Belgium and Netherlands decision, while refusing to accept the existence of a right to adopt under the ECHR, the Commission highlighted that, where adoption has taken place according to the relevant national law, a relationship emerges between adopter and adoptee that undoubtedly comes under the scope of Article 8, and separating such persons would amount to a denial of their right to respect for family life, in contrast with the State's conventional obligations.77

In the 1977 X and Y v United Kingdom decision, the Commission considered, in a rather expansive formulation, that adoption may be one way to found a family within the meaning of Article 12: "[T]he Commission considers that the adoption of a child and its integration into a family with a couple might, at least in some circumstances, be said to constitute the foundation of a family by that couple. It is quite conceivable that a "family" might be "founded" in such a way."78 Similarly, the concept that a family may well be founded by means of adopting children was alluded to in an obiter dictum in the Van Oosterwijk v Belgium case.79

The principle was more forcefully reiterated in the 1981 X v Netherlands case, where the Commission affirmed that founding a family under Article 12 does not exclusively refer to biological descent: "[T]he concept of family life in a great number of member States legitimates the view that the founding of a family, within the meaning of Article 12, does not only envisage natural children, but also adoptive children. As provided by the Article, the exercise of such a right is governed by the national laws.80

As discussed before, nothing in these decisions suggests an obligation under Article 12 to provide for adoption, and where the legal option exists it is governed by domestic laws. However, once the family has been founded in accordance with domestic provisions, adoptive families are assimilated to natural families for the purposes of the protection afforded by Article 8. In the 1982 X v France decision,81 the Commission clearly stated that adoptive families are covered by Article 8. The applicant and his wife had adopted a 6-year-old boy in 1968 with the consent of the natural mother, but following the death of the applicant's wife and his remarriage a conflictual situation had developed with the child, with the result that the applicant entrusted the child provisionally in 1975 to his natural mother. Two years later, the mother refused to return the child, she requested guardianship and obtained a court decision withdrawing the applicant's parental authority, and awarding the child to her. The Commission observed, relying on X v Belgium and Netherlands, that although the right to adopt is not one of the rights specifically guaranteed under the Convention, the relations between an adoptive parent and an adopted child are as a rule the same family relations protected by Article 8.82

The Court found however that the domestic legislation did not discriminate between adoptive parents and biological parents in respect of the possibility of withdrawal of parental responsibility for lack of care; the proceedings leading to the judicial decision to withdraw parental authority applied, as between the adoptive father and the natural parents.

Commission is of the opinion that a State cannot separate two persons united by an adoption contract, or forbid them to meet, without engaging its responsibility under Article 8 of the Convention.

75 See X v Netherlands, cited, at n. 77: "The fact that the applicant cannot claim the right to adopt and have a family in the same climate as the family relations protected by Article 12 of the Convention, The


77 See Van Oosterwijk v Belgium, Application no. 7857/76, Eur Comm H.R. report of 1 March 1979, para. 59: "une famille peut toujours être fondée par l'adoption d'enfants."

78 X v France, Application no. 5807/70, Eur Court H.R. judgment of 26 July 2007, para. 27.

79 X v France, Application no. 5807/70, Eur Court H.R. judgment of 26 July 2007, para. 27.


81 X v France, Application no. 5807/70, Eur Court H.R. judgment of 26 July 2007, para. 27.
mother, the same principles that would have applied in a custody case between two divorced parents, the emphasis being placed on the child's physical and emotional well-being. The complaint was rejected insofar as the withdrawal of parental responsibility sought to secure the "health" and "protection of the rights" of the child within the meaning of Article 8 (2).

The 2004 judgment of the Court in the Pini and Bertani case confirms and consolidates the Commission's approach to adoptive families as covered by Article 8, even in an extreme case where the relationship between adopters and adoptees is merely a legal one. The two Italian applicants, a man and a woman, had obtained adoption orders in respect of two 9-year-old Romanian girls living in a private care centre. However, the care centre had refused to transfer custody to the applicants, who complained that the Romanian authorities had not taken the necessary steps to enforce the order. Even though the children concerned had never lived with their adoptive families, the European Court found that there was a bond between the applicants and their adopted children that benefited from Article 8 guarantees: although the right to adopt is not, as such, included among the rights guaranteed by the Convention, the relations between an adoptive parent and an adopted child are as a rule of the same nature as the family relations protected by Article 8 of the Convention.

Thus, a relationship created by a lawful final adoption order, conferring parental status upon the applicants, even in the absence of any close de facto ties, was sufficient to trigger the protection of Article 8. A parallel can be drawn with previous case law establishing that the mere biological bond between parent and child gives rise to "family life" within the meaning of Article 8 before they had a chance to develop a family life together, and that Article 8 may even extend to the potential relationship between a child born out of wedlock and the putative father seeking to challenge the presumption of paternity in favour of his former fiancee's husband. Analogously, the mere legal bond between adoptive parent and adoptive child triggers the application of Article 8, which protects the potential relationship they may develop. This seems to indicate that the recognition of the equal value of adoption-based descent with respect to natural descent.

Interestingly, however, the presence of parental ties based on adoption results in an alteration of the balancing exercise normally undertaken by the Court to decide cases in which the interests of parents and children are in conflict. The Court seems to suggest in Pini and Bertani that in adoption cases the interests of the children more easily prevail over the interests of the adoptive parents: «The Court considers that it is even more important that the child's interests should prevail over those of the parents in the case of a relationship based on adoption.» The explanation lies in the fact that «adoption means "providing a child with a family, not a family with a child".» Adoptive parents are, therefore, in a more precarious position when compared to biological parents, for the courts are entitled to treat the children's welfare as paramount rather than seek to achieve a fair balance between conflicting rights.

Thus, in Pini and Bertani the applicants' aspirations to found a family were subordinated by the competing interests of the children: the applicants' right to develop ties with their adopted children was circumscribed by the children's interests, notwithstanding the applicants' legitimate aspirations to found a family. Greater weight was placed on the children's welfare and interests, to a foreign country and life with persons they perceived as strangers, and on their unlikely harmonious integration into the new family. The domestic authorities' decision not to further seek to enforce the adoption orders was consequently not found in breach of Article 8. The decision does not appear unfair on the facts of the case, considering that at issue was the adoption of older children, and that the adoptive parents had never actually fulfilled a parental role. Nonetheless, the general principle allowing for a difference of treatment between an adoptive parent and a natural parent may appear less justified in cases concerning adoption of babies, and where the adoptive parent has cared for the child for a long period of time.

The principle of Pini and Bertani is in sharp contrast with the view taken in Johannsen v Norway with regard to natural parents. In that context the Court rejected the respondent government's claim that, in case of contrast between parents' and children's interests, the latter are paramount, and insisted that «a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child.» The Court continued by saying that [J]n carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents" in particular [...] the parent cannot be entitled under Article 8 [...] to have such measures taken as would harm the child's health and developments.}

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43 Pini and Bertani & Monera and Artopoli v Romania, Applications nos. 78028/01 and 78030/01, Eur Court H.R. Judgment of 22 June 2004.
44 See ibid., para. 140.
45 See Johannsen v Norway, etc., para. 78.
46 Ibid. (emphasis added). See, however, Tousef v Netherlands, Application no. 33711/96, Eur Court H.R. Judgment of 15 November 2002, para. 73, for a decision where the child's welfare was considered "paramount" when competing with the nature parent's interests. Nonetheless, it should be pointed out that
seems to suggest that the children’s interests are paramount in case of conflict with the interests of adoptive parents, while in case of conflict with the biological parents’ rights anything falling short of physical or emotional (risk of) harm may not reach the threshold required. Against the background of the recognition of the adoptive family as “family” for all intents and purposes under Article 8, this is undoubtedly an important distinction in the level of protection afforded to adoptive parents as opposed to natural parents.

Another difference between biological families and adoptive families is that the latter are not necessarily irreversible. However, a decision revoking an adoption order is a very serious interference and needs to be justified by compelling reasons under the second paragraph of Article 8. In the 2010 Karouchkin v Ukraine judgment, the Court found that the annulment of a child’s adoption was a disproportionate interference in the adoptive father’s family life; the decision was not supported by sufficient reasons to demonstrate that it was necessary in a democratic society.

The Strasbourg Court also had an opportunity to assess whether there can be any lawful difference of treatment between biological children and adoptive children. In Pla and Pansacu v Andorra, the Court considered whether discrimination of adopted children with regard to inheritance rights was compatible with the ECHR. Interestingly, the case did not concern statutory provisions on adoptive children’s inheritance rights, but the interpretation of a testamentary disposition drafted in 1939 and executed in 1995. The testamentary intended to live her assets to her son as life tenant, with the remainder to a son or grandson of a lawful and canonical marriage. Submitting that, as an adopted child of the deceased’s son, the adoptive could not inherit under the will, two great-grandchildren of the testamentary brought civil proceedings; the court of appeal considered that adoption had been unheard of in Andorra during the first half of the twentieth century, and therefore the intention of the testamentary could not have been to include an adoptive child.

The European Court found that there had been a violation of Article 14 read in conjunction with Article 8. There was nothing in the will to suggest that the testamentary intended to exclude adopted grandsons, and the interpretation of the notion of “son” as to cover only biological sons was in blatant disregard of the prohibition of discrimination.

6. Recognition of foreign adoptions

The margin of appreciation recognized to States in connection with the regulation of domestic proceedings for adoption applies a fortiori to the treatment of foreign adoptions. As expressed by the Commission in the already mentioned X and Y v United Kingdom decision, States are under no obligation to admit international adoptions, to recognize legal effects to adoptions occurred in other States; or to permit the entrance of foreign minors into their territory with a view to adoption proceedings. The Commission indicated consistent with UK’s conventional obligations the decision not to recognize the adoption in India of an Indian child by the uncle, a British citizen of Indian origins, and consequently not to allow the child to enter the UK in order to live with the adoptive father. According to the Commission, as long as the State does not interfere with a person’s right to procreate, the refusal to grant the individual a right to found a family according to a particular procedure sought by him or her does not breach Article 12 ECHR.

Naturally, States have an obligation to recognize foreign adoptions when such recognition stems from other commitments under international law. The 1986 UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally prescribes the right of the adoptive family to adequate protection, especially in case of inter-country adoptions, for which recognition of the foreign adoption order is critical.

However, no enforceable right can be based on a non-binding instrument. Conversely, a proper legal obligation to recognize legal effects to foreign adoptions

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Footnotes:

1. Ibid., paras. 58-59.
2. Ibid., para. 61.
3. Ibid., para. 62.
4. See X and Y v United Kingdom, c.s., p. 35. "While the first applicant may have been prevented from expressing his right to "found a family" in the particular way in which he desired, the Commission does not therefore consider that this was inconsistent with Article 12, since the relevant national law did not allow for the exercise of the right in such a way. There is no question of the right of the first applicant and his wife to procreate children having been interfered with." Also, since, despite the adoption, the child had continued to live with the birth family, and between him and the uncle adoptive father there had never been effective family life, the Commission held that Article 8 was not applicable.

5. Article 23 of the Declaration reads: «In intercountry adoption, as a rule, the legal validity of the adoption should be assured in each of the countries involved.»
binds the States Parties to the 1993 Hague Convention on inter-country adoption. The chief aims of the Convention include the introduction of uniform standards in adoption proceedings in the Contracting parties, and the mutual recognition of adoption orders to protect the new families thus created. Article 5, concerned with the conditions for adoption, does not consider eligibility issues, but Article 24 provides for a safeguard clause, allowing States to refuse recognition based on public order considerations, and taking into account the best interests of the child. This seemingly suggests that States who do not recognize same-sex marriages or civil partnerships may lawfully deny legal effects in their jurisdiction to an adoption order granted to a same-sex couple. However, where the facts of a case fall outside the temporal or material scope of application of the Hague Convention, one might inquire whether any guarantees stem from the human rights enshrined in the ECHR.

In Wagner and J.M.W.L. v Luxembourg, the European Court was called to assess the legitimacy under the ECHR of a State’s refusal to recognize a lawful foreign adoption. The claimant, who had adopted a three-year-old girl in Peru as a sole applicant, sought to have the Peruvian adoption decision declared enforceable in Luxembourg, with a view to secure, amongst other things, the acquisition of Luxembourg nationality by her daughter. Her application had been dismissed by the domestic courts, based on the fact that under domestic law unmarried persons were not eligible to adopt. Having found that there had been an interference with Mrs Wagner’s and her daughter’s right to respect for family life, and that the interference pursued the legitimate aim of protecting “health or morals” and the “rights and freedoms” of the child, the Strasbourg Court undertook to examine whether the measure was necessary in a democratic society.

To that end, the Court observed that a broad consensus existed in Europe in favour of adoption by unmarried persons, and that, moreover, the denial of full recognition to the adoption failed to take account of the actual social reality of the case; as a result of the authorities’ refusal to fully recognize the adoption, the claimants encountered obstacles in their day-to-day lives (including the need to regularly apply for a resident permit and a visa to travel to certain countries). The national decision therefore did not promote the best interests of the child. This also amounted, for the Court, to unlawful discrimination, insofar as the Peruvian girl had been penalised on account of her status as an adoptive child of an unmarried mother whose family ties were based on a foreign adoption order. It could be argued that a person can circumvent national legislation on adoption by seeking an adoption order abroad under a more permissive legislation. However, the Court’s argument concerning the importance of protecting the social reality is compelling. As long as there are no public policy reasons against recognition, no one’s interests are served (and especially not the child’s) by placing legal obstacles in the path of the development of a normal family life.

2. Conclusions: the demise of the margin of appreciation doctrine?

The examination of the Strasbourg jurisprudence on adoption reveals that, while no right to adopt is recognized under the Convention (hence no obligation for States to include adoption in their legal systems), the regulation of this institution where States choose to introduce it is not free from European judicial supervision. The Fretté and E.B. rulings suggest that the lack of recognition by the Court of a right to adopt under Article 8 no longer has any practical effect, since the Court is willing to accept that adoption-related matters fall within the general ambit of Article 8. Even though States have no obligation to introduce legislation contemplating adoption, wherever they have done so (i.e. in the case of virtually all Contracting Parties), any claims involving adoption proceedings will be considered under Article 8, which is tantamount to admitting that the exercise of the right to adopt is protected under Article 8.

In the earlier case law, the Strasbourg organs were merely concerned with existing ECHR rights potentially interfered with in the course of adoption proceedings, such as the right to respect for family life of natural parents, whose claims under Article 8 raised no controversy. The protection of adoptive families lawfully created in accordance with domestic pre-requisites also appears as an unproblematic step taken by the European organs in their evolving interpretation of the Convention. Another uncontentious principle emerging from the case law is that adoption must be governed by the principle of paramountcy of the child’s interests, insofar as, unlike other means of founding a family such as artificial insemination, adoption is not primarily about giving a child to a family, but about giving a family to a child. Naturally, there is a risk of arbitrariness in resorting to concepts as vague and subjective as “best interests”, and indeed “[t]he danger of such an approach is that the best interests principle becomes an essentially meaningless concept which can be invoked as a self-serving principle by
The stance of the Court may be humanely justified, but it remains legally flawed. On one hand, it is not consistent with the application of the margin of appreciation doctrine, which builds European standards on the common denominators, and allows wide discretion to national authorities in matters characterized by a lack of European consensus.129 The E.B. ruling appears in striking contrast with the recent application of this doctrine in the A, B and C v Ireland 2010 decision,130 where the Court (surprisingly) stated that, even though virtually all other European States permit abortion, a margin of appreciation should still be recognized to the Irish authorities in this particularly sensitive field.131 There is a risk that the inconsistent use of the margin of appreciation doctrine could render European decision-making arbitrary and unpredictable.

Undoubtedly, certain aspects of adoption, in particular adoption by homosexuals, are still the subject of much disagreement in Europe,120 and do not justify impositions under the umbrella of the European Convention. On the one hand, State authorities remain closer to their community, hence in a better position to assess its social perceptions and moral values at any given point in time. On the other hand, since there are no conclusive empirical studies on the welfare of children brought up by same-sex parents, the European Court should be guided by the precautionary principle, and opt for a less proactive approach.

It is submitted that, absent a common European denominator, important legislative choices, significantly involving the sensitivities of national communities, should not be made in the European Court, but in national Parliaments. Thus, the awareness of any minority values and legitimate interests needs to pass through the communities’ social conscience and through the debates of national legislatures rather than being imposed.

129 See, for example, A k v France, etc., paras. 74-75: "The Contracting States will usually enjoy a wide margin of appreciation if the public authorities are required to strike a balance between competing private and public interests or Convention rights. This applies all the more where there is no consensus within the member States of the Council of Europe as to the relative importance of the interest at stake or as to the best means of protecting it.

130 A, B and C v Ireland, Application no. 25579/95, Eur Court H.R. judgment of 16 December 2010, para. 231-232.

131 The Court observed that a consensus existed among the majority of the member States of the Council of Europe allowing broader access to abortion than under Irish law, indeed Ireland was the only Council of Europe member State which allowed abortion only when the pregnancy posed a risk to the life of the expectant mother (abortion was available on request in some 30 European countries, it was available for health-related reasons in approximately 40 States), and only three States (Andorra, Malta and San Marino) had more restrictive access to abortion than Ireland, in which States abortion was prohibited regardless of the risk to a woman’s life. However, the Court found that the undisputed consensus among the Council of European member States was not sufficient to narrow decisively the broad margin of appreciation the State enjoyed as regards the balancing of the conflicting interests of the foetus and the mother.

128 See J. TURIN – R. MCAIN, Public international law and the regulation of private spaces, cit. p. 498-499: "It is crystal clear from this judgment that it is no longer lawful under the Convention for States to operate a blanket rule that they will not permit adoption by homosexuals. While sexual orientations can be relevant, along with all other circumstances, it cannot be a bar to eligibility."
top-down from Strasbourg. The current approach is arguably at odds with the European Court's judicial role: as interpreter of ECHR rights, the Court should seek to reflect existing mentalities and not to be at the vanguard of new and perplexing paradigms. The ECHR is not a catalogue of abstract and objectively “just” values outside a specific geopolitical context, but an international treaty to be interpreted according to the common practice of States, with an emphasis on the current status of harmonisation of moral and legal values across Europe.

1. Introduction

Nous pouvons dire que l'Espagne a mis la juridiction universelle à la mode. Le vendredi 16 octobre 1998, à trois heures du soir, le Juge Baltasar Garzón Rea, magistrat-juge du Tribunal Central d'Instruction numéro 5 de l'Audience Nationale a rédigé un mandat international de recherche et d'arrêt, pour de génocide, terrorisme et torture, contre l'ex-chef d'État du Chili, Auguste Pinochet Ugarte, sachant qu'il se trouvait dans une clinique londonienne, en convalescence en raison d'une opération chirurgicale.

Tous les téléspectateurs du monde se sont actionnés et c'est ainsi qu'on a popularisé l'expression "juridiction universelle".

M. Pinochet se trouvait à Londres, en visite privée, sans aucune immanence et les agents de Scotland Yard, avec leurs interprètes, ont communiqué l'arrestation formulée par le juge britannique de leur juridiction, qui avait reçu la commission rogatoire du juge espagnol.

Cela a représenté un coup de masse et un casse-tête pour les politiciens et les diplomates, et une énorme source d'animation pour les défenseurs de la cause des droits de l'homme.

Ce n'est pas parce que la juridiction universelle n'était pas une institution juridique internationale suffisamment connue par les experts, sinon parce que c'était la première fois qu'une arrestation ayant de telles caractéristiques avait été activée, en se basant sur la compétence attribuée par une loi interne à un juge national sans aucune relation avec la majorité des délits, qui avaient été commis à l'étranger, par des étrangers, contre des étrangers.

Pour le Royaume-Uni, il ne s'agissait pas d'une demande de juridiction universelle sinon, techniquement, d'une réponse à une demande d'extradition par l'Espagne, dans le cadre d'un traité dont les deux États étaient parties.

Toutefois, la répercussion médiatique a déclenché toutes les alarmes juridiques. De fait, à partir de cette affaire, des études consciencieuses ont été entreprises sur cette